MANAGED FUNDS ASSOCIATION

VIA E-MAIL & HAND DELIVERY

April 6, 2006

Ms. Mary L. Schapiro
Vice Chairman & President, Regulatory Policy and Oversight
NASD
1735 K Street, NW
Washington, DC 20006-1500

Re: NASD Notice to Members 04-50: Treatment of Commodity Pool Trail Commissions under Rule 2810

Dear Ms. Schapiro:

By this letter, Managed Funds Association ("MFA") and its members voice strong opposition to the recent unwritten, unofficial NASD staff interpretation of NASD Notice to Members 04-50 concerning the treatment of commodity pool trail commissions under Rule 2810. MFA learned of this recent interpretation from members' reports of comments during the registration process rather than from any official NASD source. As demonstrated below, the commodity pool industry has been operating in the good faith reliance on the interpretation of Notice 04-50 provided by the staff in 2004. In addition to being at odds with prior interpretation, MFA believes that the recent interpretation is inconsistent with applicable law. MFA respectfully requests that the recent interpretation be abandoned in favor of the prior interpretation and applicable law.

MFA is the leading US-based membership organization dedicated to serving the needs of professionals who manage hedge funds, funds of hedge funds and managed futures funds. Our over 1,000 members manage a significant portion of the estimated $1.5 trillion invested in these alternative investment vehicles globally. Among the MFA membership are commodity pool operators (CPOs), commodity trading advisors (CTAs), as well as NASD-member broker-dealers, who represent a significant portion of the estimated $130 billion invested in managed futures products, including publicly offered commodity pools. Accordingly, MFA's members have a keen interest in the recent interpretation of NASD's Notice.

Notice to Members 04-50. Notice to Members 04-50 rescinded the NASD's long-held interpretation that excluded trail commissions paid by publicly offered commodity pools from the underwriting compensation limits of the NASD's Rule 2810. Footnote 1 of the Notice "grandfathers" the compensation arrangements in commodity pool offerings that were previously approved by the NASD. The footnote reads as follows:

> This interpretation does not alter the compensation that may be paid in offerings of commodity pool DPPs that have already been approved by the Department. However, future offerings of commodity pool DPPs, even additional offerings of securities by commodity pool DPPs previously approved by the Department, must adhere to the compensation limits of the DPP Rule.

In view of industry comments submitted to the SEC in response to initial publication of the Notice, on September 9, 2004, the NASD extended the effective date of the Notice from July 13, 2004 to October 12, 2004. It also extended the grandfather footnote to cover all pool interests the registration statements for which were filed prior to October 12, 2004.

The Original Interpretation. At least two attorneys representing public commodity pools requested and received oral interpretations of the footnote shortly after the promulgation of the Notice and prior to the extension to October 12, 2004. Those interpretations were uniform and were summarized by one firm in an e-mail to clients, the pertinent text of which follows:

> Pursuant to telephone conversations that we had today with an examiner (Gabriela Aguero, who has been the examiner on a number of our recent public pool filings) in the NASD's Corporation Finance Department (the "Department"), who, in turn, spoke with Therese Woods, Deputy Director of the Department, we confirmed that the Department will not apply the Interpretation to Units which have previously been registered under the Securities Act of 1933 (the "Securities Act") and which are the subject of a Registration Statement on Form S-1 that has previously been filed with the Department and which filing has been "approved" by the Department through the issuance of a "no objections" letter; the Interpretation will only apply to additional Units which are registered under the Securities Act on and after the date of the Interpretation (July 13, 2004) and which are part of a Registration Statement on Form S-1 which is, thus, reviewed by the Department subsequent to July 13, 2004 (and which will be the subject of a no-objections letter issued on and after July 13, 2004).

As noted above, the effective date of the Notice was extended to October 12, 2004 and coverage of the grandfather footnote was extended to registration statements filed prior to October 12, 2004. Thus, the commodity pool industry has believed since 2004 that any commodity pool interests the registration statements for which were filed prior to October 12, 2004 were grandfathered from operation of the limitations in Rule 2810. The limitations in Rule 2810 were to apply only to commodity pool interests the registration statements for which were filed after October 12, 2004, including registration statements registering additional interests in existing commodity pools.

The Recent Interpretation. Registrants are now being told that the grandfathered interests are only grandfathered for a two-year period ending on the two-year anniversary of the effective date of the registration statement for the interests. This two-year limitation was not

contained in the Notice or in any of the staff discussions that followed in 2004. This limitation is not included in any public notice, as far as we know. Moreover, it is not mandated by federal securities law.

The two-year limitation purportedly arises from the NASD staff's belief that a registration of interests terminates after two years as a matter of securities law. This is not a correct statement of the law or the SEC's rules. In fact, securities registered in 2004, once registered, continued to be registered until sold or withdrawn from registration.

The only reference to a two-year period is in Rule 415 under the Securities Act of 1933. The rule governs registration of delayed or continuous offerings of securities. The rule provided (and still provides) that securities such as commodity pool interests may be registered for a continuous offering "in an amount which, at the time the registration statement becomes effective, is reasonably expected to be offered and sold within two years from the initial effective date." The rule does not require that securities not sold within two years of effectiveness be withdrawn or re-registered.

In fact, recent amendments to Rule 415 are further evidence that no such two-year requirement exists. The amendments highlight the fact that the SEC did and does not view the failure to fulfill the expectation of sales within two years as requiring re-registration. The amendments deleted the requirement of reasonable expectation of sale within two years for securities registered on S-3 or F-3. Separately, the amendment added a specific requirement for re-registration of certain securities after three years from the effective date of a registration statement for a continuous offering. This re-registration requirement did not exist in 2004 and applies only to new registration statements filed on and after December 1, 2005. The issuer of securities registered pursuant to Rule 415 in 2004 (before these amendments were adopted), had to have a reasonable expectation that the securities could be offered and sold within two years. But, there was no finite date at which the securities were required to be re-registered if unsold.

Conclusion. Since 2004, the commodity pool industry has understood that new registrations of pool interests, including registrations of additional units of existing pools, would have to comply with the limitations in Rule 2810. The industry has also understood that interests the registration statements for which were filed before October 12, 2004, were grandfathered from the application of the limitations in Rule 2810. The industry has planned its business and operations accordingly, including planning for new offerings with new trail economics. No one in the industry has planned for a requirement that the grandfathered interests be sold within two years or lose their grandfathered status. In fact, there are commodity pools currently offering interests that were registered more than two years ago which are relying on this grandfathered status. One of our members is the sponsor of a pool whose registration statement went effective in November 2003. The sponsor sought the above-quoted legal advice and clarification from NASD staff that the Notice did not affect interests registered prior to July 13, 2004 (later extended to interests the registration statement for which was filed prior to October 12, 2004). The recent interpretation, which the sponsor learned about only through industry scuttlebutt, would have the effect that all interests sold after the two-year anniversary in November 2005 are

not grandfathered and are subject to the trail commission cap. This has caused consternation to the sponsor, the broker/dealer syndicate and the individual brokers distributing the interests, all of whom understood that the interests registered under the November 2003 registration statement were grandfathered.

If NASD is interested in the "state of mind" of industry participants, it should be obvious that if this sponsor had any inkling that NASD intended a two-year expiration of grandfathered interests, it would have filed a new registration statement just prior to the October 12, 2004 cutoff, as in the case of Frontier Fund where this issue recently arose. Under the recent interpretation, Frontier Fund would have grandfathered interests until February2007 and the other sponsor's interests ceased to be grandfathered, to the shock and surprise of everyone concerned, in November, 2005. What kind of justice is this? The new two-year interpretation was not included in the Notice, the SEC release extending the effective date of the Notice or in any conversations with NASD staff. Neither is a two-year requirement imposed by rule 415 or any other securities law. From the industry's perspective, this situation looks like NASD staff, using hindsight, either wish NASD had stated a two-year expiration of grandfathered interests or were under the misapprehension that Rule 415 or some other rule automatically caused the expiration of registered interests, a misapprehension not shared by anyone in the industry who was involved in this matter. This recent *ex post facto* interpretation has caused tremendous disruption in the industry, would be unfair to all parties involved, and would discriminate unreasonably among the parties involved.

As demonstrated in this letter, NASD staff is reinterpreting its grandfather provision well after its effective date. Imposition of this new requirement would require new registration statements for commodity pools for no reason other than to comply with the interpretation. Such filings are extremely expensive and time consuming. Moreover, the economics with respect to these interests would have to be changed in mid-stream. We believe that this result would be unfair, overly burdensome and unnecessary. Therefore, we request that the NASD abandon this recent interpretation.

We are happy to meet with you and your colleagues at the NASD to discuss the comments set forth above. I can be reached at 202.367.1140.

Sincerely,

/s/ John G. Gaine
John G. Gaine
President

cc: Elisse B. Walter, Executive Vice President, Regulatory Policy & Programs
March Menchel, Executive Vice President & General Counsel, Regulatory Policy & Oversight
Thomas M. Selman, Senior Vice President, Investment Companies/Corporate Financing
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